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No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

BRADLEY BOE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Section 1113 of the Department of Defense Authorization Act of 1983—which states that those who fail to register as required by the Military Selective Service Act shall be ineligible for assistance under Title IV of the Higher Education Act of 1965—is a bill of attainder.

2. Whether Section 1113—which also states that those who wish to receive Title IV assistance and who are required to register must file a statement of compliance with their colleges—compels such persons to incriminate themselves in violation of the Fifth Amendment.

PARTIES TO THE PROCEEDING

In addition to the Selective Service System, appellants in both cases include Major General Thomas K. Turnage, the United States Department of Education, and Terrel H. Bell.

In addition to the Minnesota Public Interest Research Group, Inc., the appellees in the first captioned case are individuals using the pseudonyms John Doe, Richard Roe, and Paul Poe.

In addition to the individual employing the pseudonym Bradley Boe, the appellees in the second captioned case are individuals using the pseudonyms Carl Coe and Frank Foe.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court upon issuance of the preliminary injunction (App. A, *infra*, 1a-30a) is reported at 557 F. Supp. 937. The opinion accompanying the permanent injunction (App. B, *infra*, 31a-37a) is not reported.

JURISDICTION

The jurisdiction of the district court was based on 28 U.S.C. (Supp. V) 1331. The judgments of the dis-

trict court (App. C, *infra*, 38a-41a) were entered on June 16, 1983. Notices of appeal (App. D, *infra*, 42a-45a) were filed on June 21, 1983, and June 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 1, Section 9, Clause 3 of the Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

The Fifth Amendment to the Constitution provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

2. Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748, provides:

> (a) Section 12 of the Military Selective Service Act (50 U.S.C. App. 462) is amended by adding after subsection (e) the following new subsection:
>
> "(f)(1) Any person who is required under section 3 to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965.
>
> "(2) In order to receive any grant, loan, or work assistance under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), a person who is required under section 3 to pre-

sent himself for and submit to registration under such section shall file with the institution of higher education which the person intends to attend, or is attending, a statement of compliance with section 3 and regulations issued thereunder.

"(3) The Secretary of Education, in agreement with the Director, shall prescribe methods for verifying such statements of compliance filed pursuant to paragraph (2). Such methods may include requiring institutions of higher education to provide a list to the Secretary of Education or to the Director of persons who have submitted such statements of compliance.

"(4) The Secretary of Education, in consultation with the Director, shall issue regulations to implement the requirements of this subsection. Such regulations shall provide that any person to whom the Secretary of Education proposes to deny assistance or benefits under title IV for failure to meet the registration requirements of section 3 and regulations issued thereunder shall be given notice of the proposed denial and shall have a suitable period (of not less than thirty days) after such notice to provide the Secretary with information and materials establishing that he has complied with the registration requirement under section 3. Such regulations shall also provide that the Secretary may afford such person an opportunity for a hearing to establish his compliance or for any other purposes."

(b) The amendment made by subsection (a) shall apply to loans, grants, or work assistance under title IV of the Higher Education Act for periods of instruction beginning after June 30, 1983.

STATEMENT

1. Section 3 of the Military Selective Service Act, 50 U.S.C. App. (Supp. V) 453, empowers the President, by proclamation, to require the registration of every male citizen and male resident alien between the ages of 18 and 26. Its purpose is to facilitate any conscription that may eventually be necessary. See 50 U.S.C. App. 454. Section 12 of the Act, 50 U.S.C. App. (& Supp. V) 462, imposes criminal penalties for violations of the Act, including failure to register. Although draft registration was discontinued in 1975, it was reactivated by President Carter on July 2, 1980. Proclamation No. 4771, 45 Fed. Reg. 45247 (1980).

On September 8, 1982, Congress enacted and the President signed the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.* Section 1113 of that Act was passed by an overwhelming bipartisan majority in each house after a full and vigorous debate. See 128 Cong. Rec. S4942-S4945 (daily ed. May 12, 1982); 128 Cong. Rec. H4756-H4772 (daily ed. July 28, 1982). It provides (96 Stat. 748):

> (f)(1) Any person who is required under section 3 to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965.
>
> (2) In order to receive any grant, loan or work assistance under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), a person who is required under section 3 to pre-

> sent himself for and submit to registration under such section shall file with the institution of higher education which the person intends to attend, or is attending, a statement of compliance with section 3 and regulations issued thereunder.

Section 1113 directs the Secretary of Education, in agreement with the Director of the Selective Service System, to prescribe methods for verifying the statements of compliance required by subsection (f)(2), and to issue implementing regulations. Those regulations were issued in final form on April 11, 1983. 48 Fed. Reg. 15578 (to be codified at 34 C.F.R. Pt. 668). Section 1113 applies to loans, grants, and work assistance under Title IV of the Higher Education Act of 1965, 20 U.S.C. (& Supp. V) 1070 *et seq.* for periods of instruction beginning after June 30, 1983.[1]

The legislative record shows that Congress enacted Section 1113 in order to encourage registration and to promote a fair allocation of scarce federal aid dol-

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[1] Because of the district court's preliminary and final injunctions, the regulations did not go into effect until Justice Blackman issued a temporary stay on June 24, 1983. On July 6, 1983, the Secretary announced that schools could disburse Title IV aid through July 31, 1983 without first getting Statements of Registration Compliance from recipient students. 48 Fed. Reg. 31175. This was done in order to ease the administrative burden on schools, which could as a result process aid requests in advance of securing the required statement. On July 21, 1983 the Senate voted to extend the grace period (disbursement of aid first, statement of compliance later) from July 31, 1983 through September 30, 1983. 129 Cong. Rec. S10552 (daily ed. July 21, 1983). We are informed that the conference committee considering the Department of Defense Authorization Act of 1984 has agreed to the Senate provision. S. Conf. Rep. No. 98-213, 98th Cong., 1st Sess. (1983).

On July 22, 1983, the Secretary extended the grace period through August 31, 1983. 48 Fed. Reg. 33695.

lars by not rewarding those who fail to register. 128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Whitehurst); *id.* at H4758 (remarks of Rep. Solomon); *id.* at H4769 (remarks of Rep. Montgomery); *id.* at H4770 (remarks of Rep. Stratton); 128 Cong. Rec. S4943-4944 (daily ed. May 12, 1982) (remarks of Sen. Hayakawa); *id.* at S4945 (remarks of Sen. Stennis and Sen. Jepsen). Supporters of Section 1113 emphasized that those who fail to register timely can still qualify for student aid by registering late. 128 Cong. Rec. H4757 (daily ed. July 28, 1982) (remarks of Rep. Whitehurst); *id.* at H4769 (remarks of Rep. Montgomery); 128 Cong. Rec. S4945 (daily ed. May 12, 1982) (remarks of Sen. Stennis). The statement of compliance forms in use accordingly do not require applicants to say *when* they registered. See 48 Fed. Reg. 15582 (1983) (to be codified at 34 C.F.R. 668.25); 129 Cong. Rec. S10544 (daily ed. July 21, 1983).

2. On November 23, 1982, the Minnesota Public Interest Research Group ("MPIRG"), a "college student-directed, nonprofit, Minnesota Corporation" (Complaint, ¶ 3), filed a complaint seeking to enjoin the operation of Section 1113. On January 24, 1983, the district court dismissed MPIRG for lack of standing, but allowed three anonymous students (John Doe, *et al.*) to intervene as plaintiffs. *MPIRG* v. *Selective Service System*, 557 F. Supp. 923 (D. Minn. 1983); *MPIRG* v. *Selective Service System*, 557 F. Supp. 925 (D. Minn. 1983).[2] The intervenors alleged that they reside in Minnesota, that they need financial aid to pursue their education, that they intend to apply for Title IV assistance, and that they are required to register with the Selective Service

[2] Richard Roe, one of the intervenors, has since decided not to apply for federal aid for the 1983-1984 school term (App. B, *infra*, 32a).

System but have failed to do so. Two days later three other anonymous students (Bradley Boe, *et al.*) filed a separate action making essentially the same allegations. The two cases were informally consolidated.

On January 28, 1983, the district court denied appellees' joint motion for a temporary restraining order. On March 9, 1983, the district court preliminarily enjoined appellants from enforcing Section 1113, but allowed them to promulgate regulations pending final disposition of the two lawsuits (App. A, *infra*, 1a-30a). The court ruled that appellees had demonstrated a sufficient threat of irreparable injury because it was "inevitable" that they would "be denied financial assistance and, consequently, the opportunity to pursue their educations" (App. A, *infra*, 5a). The district court also found it likely that appellees would succeed on the merits in showing that Section 1113 ran afoul of the Bill of Attainder Clause and the privilege against compelled self-incrimination.

Concerning the bill of attainder issue, the court said that Section 1113 "clearly singles out an ascertainable group based on past conduct[,]" and "legislatively determines the guilt of this ascertainable group" by "assum[ing] that all students who fail to submit the required statement possess a guilty intent to avoid registration requirements" (App. A, *infra*, 12a). The court identified the affected group as "non-registered students—* * * a group viewed by some as disloyal" (*id.* at 14a). It reasoned that their guilt was "legislatively determine[d]" because all who failed to submit a statement of compliance were automatically denied financial aid (*id.* at 12a). The court also viewed the denial of aid as punishment, because it "deprive[d] students of the practical means to achieve the education necessary to pursue many vocations in our society" (*id.* at 14a). The district court detected a "punitive intent" in the legislative record

(*id.* at 18a), and rejected the government's argument that such an intent was nullified by the fact that nonregistrants could avoid the denial of aid by simply registering late.

Concerning the self-incrimination issue, the district court found that the statement of compliance required by Section 1113 seeks information that "is clearly incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute the nonregistrant" (App. A, *infra*, 23a). The court believed that appellees were compelled to provide this information because they had "no option of receiving federal financial assistance in another way" (*id.* at 27a). In order to complete their education, the court stated, students are "forced" by Section 1113 "to participate in an administrative process, perhaps even a hearing, where they are asked to assist the government in its investigation of their registration status" (*id.* at 28a). In the court's view, the "denial of educational assistance is a sanction that makes assertion of the [Fifth Amendment] privilege costly, thereby compelling self-incrimination" (*ibid.*).

After the district court issued its preliminary injunction, the parties in both cases filed cross-motions for summary judgment and supplemental briefs, which the court took under advisement. On June 16, 1983, the court issued a memorandum order and permanent injunction (App. B, *infra*, 31a-37a) based largely on its opinion of March 9, 1983. The permanent injunction was nationwide in scope (*id.* at 35a, 36a), despite the fact that neither action had been certified as a class action and all the individual plaintiffs were residents of Minnesota (App. A, *infra*, 2a).

On June 29, 1983, this Court stayed the district court's June 16 order pending the timely docketing and final disposition of this appeal.

THE QUESTIONS ARE SUBSTANTIAL

The district court declared unconstitutional and enjoined nationwide the enforcement of a statutory provision designed to encourage maximum compliance with the registration requirements of the Military Selective Service Act and to promote a fair allocation of increasingly scarce federal aid dollars. The court interpreted Section 1113 as barring federal aid to students who did not register in the past, thus violating the Bill of Attainder Clause. But as Congress's debates, the Act's language, and the Secretary's regulations make clear, Section 1113 permits the award of Title IV aid to students who cure their past failure to register by doing so at the time they seek assistance. The court's erroneous construction of Section 1113 also led it erroneously to find the provision in conflict with the Fifth Amendment privilege against compelled self-incrimination.

The order of the district court, if allowed to stand, will discourage compliance with Selective Service registration requirements and reward self-proclaimed lawbreakers. This Court should note probable jurisdiction to review that order and the district court's exercise of "the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

1. Section 1113 is not a bill of attainder forbidden by Article I, Section 9, Clause 3 of the Constitution. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 (1977). None of the three definitional elements—specificity in identification, punishment, or lack of a judicial trial—is con-

tained in Section 1113. See *United States* v. *O'Brien*, 391 U.S. 367, 383 n.30 (1968). Because the statute makes benefits available to all qualified students who register at any time before applying, it does not punish any specific group. And because the statute simply dispenses funds from the public treasury on the basis of this rational legislative classification, there is no justification for requiring judicial process to determine eligibility. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 772-774 (1975).

a. Section 1113 does not adversely affect a specific and identifiable group any more than numerous other federal benefit provisions do. A good example is the Veterans' Benefits Act, 38 U.S.C. (& Supp. V) 1501 *et seq.* That Act grants (and withholds) educational benefits to statutorily defined classes in order to encourage service in the Armed Forces. 38 U.S.C. (& Supp. V) 1651, 1661. Section 1113 similarly grants (and withholds) educational benefits in order to encourage registration. In each case one presently ineligible for benefits can collect them by simply satisfying the statutory condition (service or registration). The group denied benefits is thus defined not by past action but on the basis of present and future choice.

Although historically most bills of attainder named the people to whom they were to apply, a legislative act can be an attainder if its targets are particular persons who have engaged in "past and ineradicable actions * * *." *Communist Party* v. *SACB*, 367 U.S. 1, 87 (1961); see *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 319-320 (1867). By contrast, a statute is not an attainder if "[p]resent activity constitutes an operative element to which the statute attaches legal consequences * * *." *Communist Party* v. *SACB*, *supra*, 367 U.S. at 87. The difference is that

in the latter case it is impossible for the legislature to punish "specifically designated persons or groups" (*United States* v. *Brown*, 381 U.S. 437, 447 (1965)), because anyone is free to opt out of the disadvantaged group.[8]

Section 1113 for that reason does not punish any "specifically designated persons or groups." It applies to an individual only if he "fails" to register as required. "[C]onsistent with the statutory intent to encourage registration," see pages 5-6, *supra*, the Secretary has issued regulations permitting "any non-

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[8] In *American Communications Association* v. *Douds*, 339 U.S. 382 (1950), the Court sustained against a bill of attainder challenge Section 9(h) of the National Labor Relations Act, which denied certain benefits of the Act to unions whose officers failed to file affidavits disclaiming membership in the Communist Party. The Court noted that under Section 9(h) "[p]ast conduct * * * is not a bar to" signing the affidavit and obtaining the benefits of the Act (339 U.S. at 414). "[T]here is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit" (*ibid.*). That was, the Court found, the "decisive distinction" (*id.* at 413) from cases like *Cummings*, where "the basis of disqualification was past action or loyalty," and "nothing that those persons proscribed by its terms could ever do would change the result" (*id.* at 414). Cf. *United States* v. *Brown*, *supra*, 381 U.S. at 458 ("Section 504, unlike § 9(h), disqualifies from the holding of union office not only present members of the Communist Party, but also anyone who has within the past five years been a member of the Party.").

Whatever doubt may have been cast by *Brown* upon the validity of the holding in *Douds*, it is clear that this case presents none of the same difficulties. The "alteration of * * * loyalties" required by Section 9(h) of the NLRA entailed the abandonment of conduct that was arguably constitutionally protected. See *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *Noto* v. *United States*, 367 U.S. 290 (1961). In this case, by contrast, the action required by Section 1113 is nothing more than performance of the legal duty to register.

registrant who was required to register but did not * * * [to] qualify for aid * * * if he registers with Selective Service and complies with the statement and verification requirements" during the payment period for which he seeks aid. 48 Fed. Reg. 15580, 15583 (1983) (to be codified at 34 C.F.R. 668.27(b)). Ineligibility for Title IV aid is thus "made to turn upon continuingly contemporaneous fact; [it] arise[s] only because, and endure[s] only so long as, and [individual] presently [engages in conduct] of a described character." *Communist Party* v. *SACB*, *supra*, 367 U.S. at 87.

The district court erroneously concluded that students who failed to register within 30 days of their 18th birthday were irrevocably disqualified from receiving Title IV assistance (App. B, *infra*, 33a-34a). That was so, the court said, because Section 1113 requires registration " 'in accordance with any proclamation issued under [Section 3 of the Military Selective Service Act,]' " and Proclamation No. 4771 requires those born after January 1, 1963 to register within 30 days of their 18th birthday (App. B, *infra*, 33a, quoting 96 Stat. 748). The court recognized that the Secretary's regulations permit late registrants to receive aid, but said that in that regard they contradicted the plain meaning of the statute, and so were void (*id.* at 34a) .

But although it is possible to interpret Section 1113 as requiring registration *within the time* fixed by Proclamation No. 4771, it is also possible to read Congress's language ("in accordance with") as simply requiring registration *in the manner* required by any proclamation or regulation.[4] See Proclamation No.

[4] This is not to say that those subject to the Military Selective Service Act are free *for all purposes* to register whenever

4771, 45 Fed. Reg. 45248 (1980) ("Persons who are required to be registered shall comply with the registration procedures and other rules and regulations prescribed by the Director of Selective Service."); 32 C.F.R. Pt. 1615 ("Administration of Registration"). This interpretation is supported by the language in subsection (f)(4), also added by Section 1113. Subsection (f)(4) states that the Secretary shall issue regulations providing

> that any person to whom the Secretary of Education proposes to deny assistance * * * for failure to [register] * * * shall be given * * * not less than thirty days * * * to * * * establish[] that he has complied with the registration requirement * * *.

The most natural interpretation of that provision is that nonregistrants may, upon learning of their ineligibility for Title IV aid, still have at least 30 days within which to register and qualify. The Secretary has so interpreted it. See 48 Fed. Reg. 15583 (1983) (to be codified at 34 C.F.R. 668.27(b)(1)). See also *id.* at 15580.

Any other construction of Section 1113 would in fact be perverse. The primary purpose of that section is to encourage registration by those who must register, but have not. To interpret it as unconditionally denying aid to those persons would make it impossible to accomplish that objective. Since this Court's "task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress,

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they please. Although failure to register within the time fixed by Proclamation No. 4771 does not disqualify the registrant for Title IV aid, it is a criminal offense punishable under 50 U.S.C. App. (& Supp. V) 462. As we advised the district court, however, no registrant has ever been prosecuted for late registration.

so as to comport with constitutional limitations" (*CSC* v. *Letter Carriers*, 413 U.S. 548, 571 (1973)), a proper respect for the work of Congress compels rejection of the district court's reading.

b. Section 1113 also does not inflict "punishment" within the meaning of the Bill of Attainder Clause. "The fact that harm is inflicted by governmental authority does not make it punishment" proscribed by Article I, Section 9. *United States* v. *Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring). "Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed" (*ibid.*). But in order to decide whether a statute imposes punishment, thereby bringing it within the potential reach of the Bill of Attainder Clause, a court must determine whether (1) any feature of the challenged statute falls within the historical meaning of legislative punishment, (2) "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes[,]" and (3) "whether the legislative record evidences a congressional intent to punish." *Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at 475-476, 478.

Section 1113 does not inflict any sanctions that fall within the historical meaning of legislative punishment. The consequence of failure to register is ineligibility for Title IV assistance. But the withholding of such a benefit is not comparable to the sanctions—such as death, imprisonment, banishment, and uncompensated confiscation of property—historically associated with bills of attainder. See *Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at 473-475. Rather it is—like the withholding of social

security benefits from deportees upheld in *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960)—a "mere denial of a noncontractual governmental benefit."

Legitimate and nonpunitive justifications for withholding such aid are readily apparent. Above all, Congress stressed that Section 1113 would encourage those required to register with the Selective Service System to do so. See pages 5-6, *supra*. Conditioning Title IV assistance on registration is a natural means to that end, since the class of individuals seeking student aid overlaps to a great extent the class of those required to register.

> Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce * * * private parties to cooperate voluntarily with federal policy.

Fullilove v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). Section 1113 also promotes a fair allocation of increasingly scarce federal aid dollars by rewarding with Title IV assistance only those students who have performed the legal duty imposed on them by the Military Selective Service Act. See 128 Cong. Rec. S4944 (daily ed. May 12, 1982) (remarks of Sen. Hayakawa). Finally, Section 1113 directly assists the Selective Service System in its enforcement of the registration requirement of the Military Selective Service Act. The government cannot rely solely on criminal prosecution to enforce registration, any more than it can rely solely on criminal prosecution to enforce other federal laws.

It is legitimate for Congress to devise alternative legislative means, such as Section 1113, to promote maximum compliance with the registration requirement in order to meet the important national defense goals that underlie it. See *Rostker* v. *Goldberg*, 453 U.S. 57, 64-69 (1981).

As we made clear above, pages 5-6, *supra*, the emphasis in the legislative history is on the goal of encouraging registration, not on punishing those who have failed in the past to register. Representative Solomon, the sponsor of the bill, introduced it by saying that "[t]here are some 700,000 young men in this country who have, for the most part, *unintentionally* failed to register" (128 Cong. Rec. H4757 (daily ed. July 28, 1982) (emphasis added)). It is unlikely that Congress wished to inflict harm on a group that it knew consisted largely of innocent nonregistrants. The more natural conclusion—and one amply supported by the debate on Section 1113—is that Congress hoped to offer a reminder and inducement for such people to perform a duty that they had either overlooked or neglected.

c. Given the plainly legitimate purpose behind Section 1113 (encouraging registration) and the obvious rationality of its classification (those who register may receive aid), it is unnecessary to insist on judicial procedures to implement the statute. Such procedures would be appropriate if the purpose of Section 1113 were to assign blame and mete punishment to nonregistrants, since "the legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States* v. *Brown*, *supra*, 381 U.S. at 445. But where there is no showing "of a

'bare congressional desire to harm a politically unpopular group,' * * * appellees['] * * * only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate objective that it can be used to deprive them of benefits available to those who do satisfy that test." *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 772 (citation omitted).

Section 1113 assigns no blame to those who have failed to register. On the contrary, at least for purposes of Title IV aid, it excuses even those who have willfully defied the law by allowing them a second chance to comply. The question of blame and punishment for continued nonregistration is reserved for the courts in the context of a criminal prosecution under 50 U.S.C. App. (& Supp. V) 462.

2. The self-incrimination claim raised by appellees and accepted by the district court is frivolous. The primary objective of the privilege against compelled self-incrimination is to "insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892). The compulsion requirement "comes directly from the constitutional language directing that no person 'shall be *compelled* in any criminal case to be a witness against himself.'" *South Dakota* v. *Neville*, No. 81-1453 (Feb. 22, 1983), slip op. 9. Absent compulsion, the privilege does not attach. See *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977); *Hoffa* v. *United States*, 385 U.S. 293, 304 (1966).

Here, there is no compulsion on appellees, for two reasons. In the first place, these cases are unlike all of those relied on by the district court—each of

which involved a summons, subpoena, or other form of legal compulsion to provide information to the government.[6] Appellees, by contrast, have the option of simply not applying for federal aid, and so furnishing no information whatever to the government.

There is a second, and more obvious, reason why appellees are not compelled to incriminate themselves. The district court found that Section 1113 forces them to choose between self-accusation and loss of Title IV aid, and that the threat of deprivation is sufficiently coercive to violate their Fifth Amendment privilege (App. A, *infra*, 27a-28a). But Section 1113 states that one who has not registered is not entitled to Title IV aid at all, whether he advises the government of his failure to register or not. That is a decision which, as we made clear in the last section, Congress is authorized to make. The "compulsion" envisioned by the district court is thus nonexistent, since

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[6] *Ullmann* v. *United States*, 350 U.S. 422 (1956) (grand jury subpoena); *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) (subpoena to testify before Waterfront Commission); *Quinn* v. *United States*, 349 U.S. 155 (1955) (summons to testify before congressional committee); *In re Gault*, 387 U.S. 1 (1967) (juvenile defendant); *Hoffman* v. *United States*, 341 U.S. 479 (1951) (grand jury subpoena); *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977) (grand jury subpoena); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (grand jury subpoena); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) (Attorney General's inquiry ordered by state supreme court); *Spevack* v. *Klein*, 385 U.S. 511 (1967) (subpoena duces tecum and order to testify at judicial inquiry); *Marchetti* v. *United States*, 390 U.S. 39 (1968) (statutory requirement to register and pay wagering tax); *Leary* v. *United States*, 395 U.S. 6 (1961) (statutory requirement to pay marihuana transfer tax); *California* v. *Byers*, 402 U.S. 424 (1971) (statutory requirement to stop and report car accident); *Albertson* v. *SACB*, 382 U.S. 70 (1965) (statutory registration requirement).

it is inconceivable that anyone is compelled to apply for benefits for which he is ineligible. Appellees are no more forced to choose between self-accusation and loss of Title IV aid than they are forced to choose between self-accusation and loss of Veterans' Benefits; they simply have no right whatever to either form of assistance. If we are correct in believing that Section 1113 is not a bill of attainder, then the district court's Fifth Amendment holding has the untoward effect of enabling appellees to raid the federal treasury for money to which they are not entitled.*

3. Although appellees never requested class certification, the district court's final injunction prohibited appellants from enforcing Section 1113 against any person anywhere in the United States (App. B, *infra*, 35a-36a). This Court, however, has made clear "that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 410 (1945). See also *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977).

The district court obviously confused the concept of scope of relief with the concept of personal jurisdiction. There is no dispute that where, as here, a district court has personal jurisdiction over a de-

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* We doubt that Congress entertained any intention of requiring applicants for Title IV aid to provide a statement that they had registered with the Selective Service System if registration is not a relevant qualification for Title IV assistance. Thus subsection (f)(2) is not severable from subsection (f)(1); and if we are mistaken in our conviction that the latter is not a bill of attainder, then the statement of compliance requirement would fall as well. The Fifth Amendment issue consequently has no independent significance.

fendant, it has the power to enjoin him from taking action anywhere in the United States against the named plaintiff (*Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932)), or in an appropriate case (see, *e.g.*, *Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir. 1963), cert. denied, 376 U.S. 910 (1964)) from taking action against non-parties in order to provide full relief to the parties. But even if a court is reviewing legislation that is "national in character and effect" (App. B, *infra*, 35a), it has no roving commission to correct putatively unconstitutional action wherever it may occur. Its role is limited to taking whatever steps are necessary to provide full relief to those who have invoked its jurisdiction. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175-176 (1803).

Even in the class action context, where a defendant at least enjoys the opportunity of securing a favorable judgment that will bind all members of the plaintiff class, this Court has warned district courts to be cautious in certifying a nationwide class. *Califano* v. *Yamasaki*, *supra*, a case in which the Court approved a nationwide class certification, emphasized the "detrimental effect" that such certification can have in other contexts. 442 U.S. at 702. It is difficult to reconcile this Court's concern in *Yamasaki* with the district court's view that it had equitable authority to issue a nationwide injunction even without class certification.

In these cases, where there has been no class certification, and where no other individuals have sought to join or filed suit elsewhere, there is no basis for nationwide injunctive relief. Of course once this Court has finally passed on the merits of appellees' claims, the issues will be resolved for both the appel-

lants and all present and future nonregistrants. But it is not a district court's place, in a case like this, to usurp that role. If this Court should, for some reason, decline to note probable jurisdiction, the effect would be to insulate against all further review a nationwide determination rendered in a case where it was neither sought nor authorized.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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AUGUST 1983

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-82 Civ. 1670

JOHN DOE, RICHARD ROE AND PAUL POE,
INTERVENOR-PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL H. BELL, Secretary, DEFENDANTS

3-83 Civ. 100

BRADLEY BOE, CARL COE AND FRANK FOE, PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL H. BELL, Secretary, DEFENDANTS

MEMORANDUM ORDER

This matter comes before the court upon the motions of plaintiffs in these cases for a preliminary injunction enjoining the defendants from enforcing

Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982) (to be codified at Section 12(f) of the Selective Service Act, 50 U.S.C. App. § 462(f) (1982)) and any regulations promulgated thereunder. Defendants oppose the motions.

Plaintiffs John Doe, Richard Roe, Paul Poe, Bradley Boe, Carl Coe and Frank Foe are all male residents of Minnesota, 19 to 21 years old, subject to Section 3 of the Selective Service Act who intend to apply for financial aid for the 1983-84 school year under Title IV of the Higher Education Act of 1965, 20 U.S.C. §§ 1070-1089, who will be unable to complete their educations without financial aid, and who cannot file a truthful statement of compliance with Section 3 and regulations thereunder. Defendant Selective Service System is an agency of the United States. Defendant Major-General Thomas Turnage is the Director of the Selective Service System. Defendant United States Department of Education is an agency of the United States. Defendant Terrel H. Bell is the Secretary of the United States Department of Education.

It is important to note at the outset that these cases involve only a challenge to the constitutionality of Section 1113 linking availability of federal financial assistance under Title IV of the Higher Education Act of 1965 to draft registration. These cases do not challenge the constitutionality of the law requiring registration: the validity of that law has already been upheld by the United States Supreme Court in *Rostker* v. *Goldberg*, 453 U.S. 57 (1981). In addition, these cases are not cases in which the propriety of registration versus nonregistration has been raised or argued. Finally, this decision should

not be interpreted as passing on the constitutionality of any law that would deny federal financial assistance to students after conviction for nonregistration. That issue is not before the court. The court turns now to the issues that these cases do raise.

In considering plaintiffs' motions for a preliminary injunction, the court must determine whether or not the standards set forth in *Dataphase Systems, Inc.* v. *C. L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981) have been met. The court in that case held that:

> whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on the other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Id. at 114.

I. The Threat of Irreparable Harm

Plaintiffs contend that they will suffer irreparable harm if an injunction does not issue. Plaintiffs John Doe and Paul Poe allege that they will be unable to complete their educations without financial aid. Plaintiff Richard Roe alleges that he may be unable to complete his education without financial aid. Plaintiffs Bradley Boe, Carl Coe and Frank Foe similarly allege that they will be unable to complete their educations without financial aid.

Plaintiffs point to the status of education as an important right in our society and allege that deprivation of that right constitutes irreparable harm. The United States Supreme Court in *Plyler* v. *Doe*,

—— U.S. ——, 102 S. Ct. 2382 (1982), declined to find public education a right granted by the Constitution, but did find that education was not merely some governmental benefit indistinguishable from other forms of social welfare legislation. *Id.* at 2397. After noting the importance of education in maintaining our basic institutions, the Court observed that:

> education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Id. Education has long been recognized as providing the means to "earn an adequate livelihood, to enjoy life to the fullest, [and] to fulfill . . . the duties and responsibilities of good citizens." *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

Plaintiffs contend that deprivation of a post-secondary education, or even delay in attaining that education, and consequent inability to pursue a chosen profession or occupation constitutes harm for which there is no adequate remedy at law. The Supreme Court has upheld a district court's conclusion that even a temporary inability to practice a profession constitutes such harm. *See Withrow* v. *Larkin*, 421 U.S. 35, 44 n.8 (1975).

Defendants contend that plaintiffs have failed to demonstrate a threat of irreparable harm because plaintiffs have not alleged that they have actually

applied for Title IV assistance, qualified for that assistance, and been denied such assistance. Under proposed regulations, most students will not be required to complete a statement of compliance until just prior to the time they actually receive the assistance. Thus, defendants argue, plaintiffs have not substantiated any present or immediately threatened irreparable harm to themselves.

The court is not persuaded by defendants' argument. The application process for financial aid has already begun. As noted in the Memorandum Order, January 24, 1983, § 1113 by its terms imposes a mandatory system linking availability of financial aid to draft registration. It was there pointed out that, "it must therefore be presumed that the Secretary will comply with the mandatory terms of Section 1113, and that implementation of the Section will lead inexorably to the denial of financial assistance, although the exact date of that denial cannot be presently determined." *Id.* at 6. Plaintiffs here allege that they intend to apply for aid, that they will be unable to complete their educations without aid, and that they cannot file a truthful statement of compliance. It is thus inevitable that plaintiffs will be denied financial assistance and, consequently, the opportunity to pursue their educations. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough . . . ." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (quoting *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593 (1923)).

Plaintiffs also claim that they are threatened with a second type of irreparable harm. Plaintiffs allege that § 1113 violates their fifth amendment right

against self-incrimination. Plaintiffs argue, first, that the statute penalizes those who assert the fifth amendment by denying them access to Title IV funds, impermissibly burdening the exercise of that privilege, and, second, that the statute's scheme of operation serves to incriminate those who assert the privilege because the very act of applying can lead directly or indirectly to incriminating evidence.

Defendants again maintain that plaintiffs have failed to establish a threat of irreparable harm. According to defendants, plaintiffs cannot establish that any action that poses an immediate danger to their fifth amendment rights has been taken against them. Plaintiffs do not claim that they need a preliminary injunction in order to decide whether to apply for Title IV funds, defendants argue. Furthermore, plaintiffs will not be required to submit a statement of compliance until much later in the application process.

The court finds defendants' arguments unconvincing. Many unregistered students, including plaintiffs, are faced with the choice *now* of waiving their right against self-incrimination by beginning an aid application process that will inevitably require them to furnish proof of registration or, alternatively, of foregoing financial assistance to avoid self-incrimination. Educational institutions have traditionally imposed deadlines for aid applications that precede the actual awarding of funds by several months. The University of Minnesota, which plaintiffs Doe, Poe and Roe plan to attend, last year set a deadline of March 1, 1982 for applications for the 1982-83 school year. No such deadline has been set for the current year, apparently because of these actions, but at some point an application in practical effect is too late. In

addition, some schools and universities are requiring students to certify compliance with registration requirements at the time of application. Defendants acknowledge that since final regulations may not be published until late this spring, many students will be anxious to know at the earliest opportunity whether and to what extent they will receive benefits. Defendants surmise that institutions "may have decided to *request* that students voluntarily supply registration information at the time they apply . . . . Indeed, the Secretary has encouraged institutions to do this." *See* defendants' "Statement of Points and Authorities in Opposition to Plaintiffs' Motion for a Preliminary Injunction," at 7, n.1. Thus, students at such colleges must either "voluntarily" supply potentially incriminating information or forego financial aid.

Plaintiffs in these cases are nonregistrants who would like to apply for financial aid but cannot do so without allegedly infringing their fifth amendment rights against self-incrimination. Although plaintiffs need not make their choice at this exact point in time, the dilemma they face is inevitable. Thus, they have clearly shown that they face the *threat* of irreparable harm. The court finds that plaintiffs have met the first of the four *Dataphase* standards.

II. Balancing

The second *Dataphase* standard requires the court to balance the threat of harm to the movant with the injury that granting the injunction would inflict on the other parties.

Defendants argue that granting an injunction would impair their ability to implement and enforce

§ 1113 in two ways: first, a freeze on the regulatory process would impair the ability of the Secretary of Education to issue final implementing regulations on time; and second, the Secretary would have to decide whether to halt final processing of applications until the injunction was lifted or to allow processing to go forward, making all awards subject to later recoupment.

Plaintiffs contend that it would be senseless to delay their relief in order to permit the government to issue regulations for the implementation of an unconstitutional act. Plaintiffs further argue that since the government has adequate mechanisms for enforcing violations of the registration requirement, the defendants will not be injured by issuance of the injunction.

The court agrees with defendants that they may suffer some administrative inconvenience and delay in implementing final regulations if an injunction halting all action by the government issues. The court, however, finds that the threat of irreparable harm to plaintiffs far outweighs any potential injury to defendants. Furthermore, a properly framed injunction could allow defendants to proceed through publication of final regulations but could prohibit any action by defendants to enforce those regulations pending final disposition of these lawsuits.

III. Probability of Success on the Merits

The third *Dataphase* factor involves consideration of the probability that the movant will succeed on the merits. Plaintiffs are not required to prove a greater than fifty percent likelihood that they will prevail on the merits. *Dataphase*, 640 F.2d at 113. The court there warned against a wooden application of the probability test saying:

> [T]he court ordinarily is not required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success. . . . [W]here the balance of other factors tips decidedly toward movant a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation.

Id. With this standard in mind, the court now examines plaintiffs' challenges to § 1113.

A. Bill of Attainder

Plaintiffs allege that § 1113 is a bill of attainder in violation of U.S. Const. art. I, § 9, cl. 3. A bill of attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual or group without the protections of a judicial trial. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 (1977).[1] The writings of the framers of our Constitution indicate that the "Bill of Attainder Clause was not intended as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function . . . ." *United States* v. *Brown*, 381 U.S. 437, 442 (1965).

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[1] Historically the bill of attainder was a parliamentary act sentencing one or more persons to death used in England against persons who threatened to or attempted to overthrow the government. In addition to the death sentence, the attained party's heirs could not inherit his property. The "bill of pains and penalties" was similar but its penalty was less than death, *e.g.*, banishment or deprivation of the right to vote. Most bills of both types named the parties to whom they applied, but a few merely described them.

> Thus the Bill of Attainder clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.

Id. at 445.

The Supreme Court has avoided construing the clause narrowly and instead has read it in light of the evil it was intended to bar. The Court has struck down, for example, as a bill of attainder: an amendment to the Missouri Constitution that provided no one could engage in a number of specified professions unless he first swore he had taken no part in the rebellion against the Union, *Cummings* v. *Missouri*, 71 U.S. (4 Wall) 277 (1867); a federal statute that required attorneys to take a similar oath before they could practice in federal courts, *Ex parte Garland*, 71 U.S. (4 Wall) 333 (1867); § 304 of the Urgent Deficiency Appropriation Act, 1943, which prohibited payment of further salary by the government to three named federal employees, *United States* v. *Lovett*, 328 U.S. 303 (1946); and § 504 of the Labor-Management Reporting & Disclosure Act prohibiting members of the Communist Party from holding union office, *United States* v. *Brown*, 381 U.S. 437 (1965).

Plaintiffs contend that the statute in question is directed at a specific group of persons, *i.e.*, young male students who require financial aid but cannot complete truthful statements of compliance. Defendants argue that § 1113 does not attach to specifically designated persons or groups because it does not describe persons in terms of *past conduct* but only present and

future actions, citing *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 86 (1961). Since the act is not intended to punish a class of persons who committed the past act of nonregistration and who can do nothing about it now, but instead to regulate the present and future conduct of those who wish to receive Title IV assistance, defendants contend, it is not a bill of attainder. Those who committed the past act of nonregistration could become eligible for funding by registering now.

Defendants' argument is not tenable. The Supreme Court soundly rejected the same argument over 100 years ago. In *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1867), defendant argued that plaintiff could escape the bill's prohibitions presumably by making the required loyalty oath and that the bill was only intended to regulate the present and future conduct of those who wished to practice particular professions in Missouri. *Id.* at 297, 294. The Supreme Court nonetheless held that the amendment was a bill of attainder that inflicted punishment based on the past act of affiliation with the Confederacy. *Id.* at 320.[2]

Similarly, § 1113 bears no relationship to bona fide qualifications for educational funding but instead ap-

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[2] The Court held that:

> [The clauses in the Missouri constitution] assume that there are persons in Missouri who are guilty of some of the acts designated . . . . *They are aimed at past acts, and not future acts.* They were intended especially to operate upon parties who . . . had aided or countenanced the Rebellion . . .; and they were intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their . . . avocations. *This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath.*

Cummings, 71 U.S. (4 Wall) at 327 (emphasis added).

pears to be intended to reach the past act of nonregistration. To say that plaintiffs can escape the section's prohibitions by simply registering is to say that an allegedly unconstitutional law becomes valid by its mere enforcement; it also ignores the fact that males born after January 1, 1963 must register *within 30 days* of their eighteenth birthday or be subjected to prosecution for late registration. Section 1113 clearly singles out an ascertainable group based on past conduct.

Plaintiffs further allege that § 1113 legislatively determines the guilt of this ascertainable group. Draft-age male students who fail to submit the statement of compliance are automatically denied financial aid, regardless of whether their nonregistration is intentional or innocent. The section thus assumes that all students who fail to submit the required statement possess a guilty intent to avoid registration requirements. Plaintiffs argue that a student may reasonably but mistakenly believe he is exempt from registration under one of the exemption categories; he would then be a nonregistrant but would not possess the specific intent required to punish him for the criminal offense of nonregistration under § 12 of the Military Selective Service Act, 50 U.S.C. App. § 462 (1981).

Plaintiffs also allege that the section inflicts punishment. The Supreme Court in *Nixon* v *Administrator of General Services*, 433 U.S. 425 (1977) employed a three-part test to determine whether the act in question there constituted punishment.[3] That same test can be applied to § 1113 in these cases. First, the Court looked to a historical list of legisla-

[3] The Court in that case found the act did not inflict punishment.

tive punishments. The Court found that common punishments were imprisonment, banishment, and punitive confiscation of property. The Court noted that our own country's experience added another sanction to the list of impermisible legislative punishments: "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal." *Id.* at 474.

In the cases at hand, plaintiffs urge that § 1113 deprives students of the means to attend institutions of higher education and therefore effectively deprives them of the opportunity to pursue chosen careers. Plaintiffs point to *Cummings* where the Court said:

> The deprivation of any rights, civil or political, previously enjoyed, may be punishment . . . . Disqualification from the pursuits of a lawful avocation . . . has been imposed as punishment. . . . .
>
> The theory upon which our political institutions rest is, that all [persons] have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, ... Any deprivation or suspension of any of these rights for past conduct is punishment, ...

Cummings, 71 U.S. (4 Wall) at 320, 321-22.

Defendants, on the other hand, contend that denial of financial aid does not compare to any of the sanctions historically associated with bills of attainder. The fact that harm is inflicted by governmental authority does not make it punishment. *United States*

v. *Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring). Defendants argue that withholding federal assistance under Title IV is like the withholding of social security benefits from deportees illegally in this country that the Supreme Court upheld in *Flemming* v. *Nestor*, 363 U.S. 603 (1960). In that case, the Court held that the sanction was the "mere denial of a noncontractual governmental benefit", *id.* at 617, and imposed no affirmative disability or restraint. Thus, defendants urge, § 1113 does not impose any punishment by withholding a benefit and cannot be classified as a bill of attainder.

The court is not persuaded by defendants' argument. While denial of federal financial aid is not a historical punishment, the court is not strictly confined to those sanctions that have been deemed punishment in the past. *See Nixon*, 433 U.S. at 475. If the statute in question prohibited students who could not prove they had registered for the draft from entering specific professions, *Cummings* would clearly dictate that the law be declared unconstitutional. If the statute instead prohibited those students from attending any institution of higher education, the deprivation's punitive character would also be obvious. The fact that the challenged statute deprives students of the practical means to achieve the education necessary to pursue many vocations in our society means only that the congressional means of effecting the deprivation is less direct; the statute's result is still to punish students who cannot prove their innocence. In addition, the group affected—nonregistered students—is a group viewed by some as disloyal, just as those who had aided the confederacy were thought to be disloyal in post-Civil War times and just as Communists were thought to be disloyal

in the Cold War era. *See, e.g., Cummings*, 71 U.S. (4 Wall) 277 (1867); *United States* v. *Brown*, 381 U.S. 437 (1965). Considering the importance of the opportunity to seek a college education in these times, deprivation of that opportunity based on past conduct of a group deemed to be disloyal seems to this court to be punishment.

Fleming v. *Nestor* does not mandate a different conclusion. In this court's view, it was not the characterization of the sanction as a "mere denial of a noncontractual governmental benefit" that dictated the Supreme Court's conclusion. Instead of engaging in semantic exercises similar to the "right" versus "privilege" discussions in the due process cases, the Court focused on whether the statute evinced a punitive purpose. The Court found that, "It is impossible to find in this meagre [legislative] history the unmistakable evidence of punitive intent which . . . is required before a Congressional enactment of this kind may be struck down." *Id.* at 619. Thus, the government's emphasis on the denial of financial aid as a denial of a mere benefit is misplaced.

The second element of the *Nixon* three-part test is a functional one. The Court in that case analyzed whether the law, viewed in terms of the type and severity of burdens imposed, reasonably could be said to further nonpunitive legislative purposes. Previous cases had listed a number of factors to use in a functional analysis, among them: whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether it promotes the traditional aims of punishment, whether the behavior to which it applies is already a crime, whether it has a rational alterna-

tive purpose, and whether it appears excessive in relation to that purpose. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

Plaintiffs claim that § 1113 acts as both a disability and restraint, that deprivation of benefits previously enjoyed has historically been regarded as punishment, that the law assumes nonregistrants possess guilty intent, that the law promotes the traditional aims of punishment by imposing retribution for past failure to register and by deterring future noncompliance, that the behavior it applies to is already a criminal offense under § 12 of the Selective Service Act, 50 U.S.C. App. § 462 (1981), that it has no rational educational purpose, and that it is excessively broad because it applies to those who have inadvertently failed to register as well as to those who have intentionally failed to register.

Defendants claim that the law passes the functional test because its rational nonpunitive purposes are (a) to encourage compliance with registration laws, (b) to promote a just allocation of scarce aid dollars, and (c) to assist the Selective Service in its enforcement of the draft registration laws.

The court believes that § 1113 fails the functional test. It imposes both a restraint and disability, assumes nonregistrants possess guilty intent, promotes the aims of retribution and deterrence, applies to behavior that is already a crime, and is excessively broad in relation to its alternative purposes. The court is also not persuaded that the purposes defendants allege are really alternative: under defendants' theory that the law does not punish nonregistration but encourages registration, every "punishment" could be renamed an "encouragement" thereby escaping the Constitution's proscription on bills of attainder.

The third part of the *Nixon* three-part test is a motivational test inquiring whether the legislative record evinces a congressional intent to punish. 433 U.S. at 478. Plaintiffs allege that Congress clearly intended to punish nonregistrants by making them ineligible for federal financial aid. The bill's sponsor in the House, Representative Solomon, introduced the bill with the following language:

> There are some 700,000 young men in this country who have, for the most part, unintentionally failed to register, and I intend not only to offer this amendment to this legislation, but as other legislation comes down the pike, such as the jobs training bill, such as home loans . . . , I intend to offer the same amendment *until every young man is deprived of Federal assistance unless he has obeyed the law. . . .*

128 *Cong. Rec.* H4757 (daily ed. July 28, 1982) (emphasis added). Other floor speakers evinced a similar punitive intent.[4] Representive Edgar in speaking against the bill said: "This amendment has the obvious primary objective of increasing the number of men registered . . . . *However, it also has a secondary, and more subtle, objective, which is to punish those individuals who do not register. Id.* at 4760 (emphasis added). Representative Goldwater observed that a nonregistrant "not only stands the chance of going to jail, but he also stands the chance

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[4] Representative Mitchell, for example, said, "If young men do not think enough of their country to register to defend it, I do not see any reason at all why they should get benefits from that country." *Id.* Representative Montgomery noted, "[I]t is a felony, they have violated the law, and they are not entitled to these educational benefits." *Id.*

of not receiving financial assistance for education, *which is just as harsh a penalty in terms of the boy's future.*" *Id.* at 4761 (emphasis added). Other speakers pointed to the apparent unfairness to those who had registered of allowing nonregistrants to receive loans. The intent to legislatively determine guilt and inflict punishment, plaintiffs contend, is clear.

Defendants argue that Congress intended to encourage compliance with registration, not to punish nonregistrants. It is true that the record of congressional debate contains statements that the bill's purpose is to encourage compliance. 128 *Cong. Rec.* S4943 (daily ed. May 12, 1982) (statement of Sen. Hayakawa); *id.* at 4945 (statement of Sen. Jepsen). A thorough examination of the context of those statements, however, clearly reveals a punitive intent. Senator Hayakawa who sponsored the Senate bill said, "It is a real travesty when those who will not register can turn around and apply for . . . educational benefits . . . . This [bill is] an important signal to every American that *this Congress will not tolerate any willful, blatant rejection of the responsibilities* which come with living in a free nation." *Id.* at 4944 (emphasis added).[6] Only Senator Durenberger spoke against the bill in the Senate, arguing that criminal sanctions already provided the means by which to punish nonregistrants and calling the measure a case of overkill. *Id.*

In summary, the record in both houses of Congress shows an obvious intent to punish nonregistrants. Even the addition of an intent to encourage compli-

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[6] *See also* statement of Senator Tower, "I do not know why anyone should be permitted to claim the benefits . . . financed [by] the taxpayers of this country if they are not prepared simply to register . . . ." *Id.* at 4945.

ance with registration cannot save this law: deterrence of future wrongdoing is a traditional punitive aim. As the court has already observed, under defendant's view, each statute punishing one act could be recast as encouraging another act, thereby escaping scrutiny. Such an interpretation would render our Constitution's prohibition on bills of attainder meaningless.

The court concludes that plaintiffs have shown a probability of success on the merits of their claim that § 1113 legislatively determines the guilt of and inflicts punishment on an identifiable group without the protections of a judicial trial. This court therefore finds that plaintiffs have demonstrated a probability of success on the merits of their claim that § 1113 constitutes a bill of attainder in violation of art. I, § 9, cl. 3 of the United States Constitution.

B. Fifth Amendment

Plaintiffs also allege that § 1113 violates their fifth amendment privilege against self-incrimination. The fifth amendment provides that no person "shall be compelled in any criminal case to be a witness against himself . . . ." The fifth amendment has been characterized as an important advance in the development of our liberty—"one of the great landmarks in man's struggle to make himself civilized." *Ullmann* v. *United States*, 350 U.S. 422, 426 (1956) (quoting *Griswold, The Fifth Amendment Today* (1955) 7). The policies underlying the amendment have been expressed as follows:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel

> trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitional system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" . . .; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life" . . .; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Murphy v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (citations omitted). This important constitutional protection has been interpreted liberally, in keeping with the amendment's spirit. *Ullmann* v. *United States*, 350 U.S. 422, 426 (1956); *Quinn* v. *United States*, 349 U.S. 155, 162 (1955).

While the amendment by its terms applies to criminal cases, it is clear that the "privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory" *Murphy*, 378 U.S. at 94 (White, J., concurring). The availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but on the nature of the statement and the exposure it invites. *In Re Gault*, 387 U.S. 1, 49 (1967) (hold-

ing that privilege is available in juvenile delinquency proceedings).[6]

The privilege extends not only to information that would in itself be incriminating, but also to answers that would furnish a link in the chain of evidence to prosecute. "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. *Hoffman* v. *United States*, 341 U.S. 479, 486-87 (1951). The privilege protects any disclosures that the witness may reasonably apprehend could be used in a criminal prosecution or could lead to other evidence that might be used to prosecute. *Murphy*, 378 U.S. at 94 (White, J., concurring).

Plaintiffs contend that § 1113 violates the fifth amendment in two ways: first, the statute penalizes those who assert the privilege by denying them access to Title IV funds, impermissibly burdening exercise of the privilege; and second, the statute's scheme of operation serves to incriminate those who chose to assert the privilege. Plaintiffs argue that denial of federal financial assistance to those students who assert their fifth amendment privilege is an impermissible burden on exercise of that privilege. Plaintiffs point to a series of Supreme Court cases in which denial of various rights for asserting the privilege has been invalidated. *See, e.g., Lefkowitz* v. *Cunningham*, 431 U.S. 801, (1977) (divesting political officeholder of his office and imposing a five-year ban on

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[6] *See also Lefkowitz* v. *Turley*, 414 U.S. 70, 78 (1973), holding that the privilege was available in the context of an official inquiry into the job performance of a public contractor.

holding any public or party office for refusal to waive his constitutional immunity in a grand jury investigation of his conduct held unconstitutional); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (denying public contractors the right to contract with the government for five years upon their refusal to sign waivers of immunity held unconstitutional; *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) (requiring police officers in an inquiry by the state attorney general concerning the fixing of traffic tickets to respond to questions or face removal from office held unconstitutional); *Spevack* v. *Klein*, 385 U.S. 511 (1967) (disbarring a lawyer for failure to honor a *subpoena duces tecum* and to testify at the judicial inquiry held unconstitutional).

Plaintiffs also contend that the statute's scheme of operation incriminates those students who assert the privilege. Any student who provides a false statement of compliance will subject himself to prosecution for perjury. 20 U.S.C. § 1097 (1982). Nonregistration is also a criminal offense. 50 U.S.C. App. § 462 (1981). In addition, the statute provides that the Secretary of Education, in agreement with the Director of the Selective Service, will prescribe methods for verifying statements of compliance. "Such methods may include requiring institutions of higher education to provide a list to the Secretary of Education or to the Director of persons who have submitted such statements of compliance." Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, § 1113(f)(3), 96 Stat. 748 (1982) (to be codified at 50 U.S.C. § 462(f)). Plaintiffs argue that the Selective Service System will be put on notice that a student is in violation of the law once a student asserts his fifth amendment privilege.

Defendants contend that § 1113 does not violate the fifth amendment because students are not *compelled* to provide incriminating information. Where an individual retains a bona fide, voluntary choice whether to furnish information to the government, defendants maintain, the privilege does not attach. Defendants say that plaintiffs may choose not to apply for Title IV assistance and that the economic consequences of that decision do not change its voluntary nature.

The court finds that plaintiffs have demonstrated a probability of success on the merits of their claim that § 1113 violates the fifth amendment's protection against self-incrimination. The amendment's protection extends to administrative proceedings like the one envisioned by this statute. *See* cases cited at 20, *supra*. The information required is clearly incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute the nonregistrant. In *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 77 (1965), petitioners were Communist Party members who had been ordered to register and had failed to do so. The Court found that the risks of incrimination to petitioners by registering were obvious. The form required an admission of membership in the Communist Party; that admission could be used to prosecute the registrant under at least two federal criminal statutes.

The central standard for the application of the privilege has been "whether the claimant is confronted by substantial and 'real,' not merely trifling or imaginary, hazards of incrimination." *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968). Petitioner in *Marchetti* was convicted for evading payment of an occupational tax on wagers and for failure to comply with a statute requiring those liable for the tax

to register and to supply detailed information on forms to the Internal Revenue Service. The statute required the IRS to provide to prosecuting officers a list of those who had paid the occupational tax. Petitioner contended that the statute violated the fifth amendment. The Court agreed with petitioner and found that he was confronted by a comprehensive system of prohibitions on wagering, yet was required to provide information that he might reasonably suppose would be available to prosecuting authorities and that would surely prove a significant link in a chain of evidence tending to establish his guilt. Wagering, the Court said, was an area permeated with criminal statutes and those engaged in wagering were a group inherently suspect of criminal activities. *Id.* at 47. *See also Leary* v. *United States*, 395 U.S. 6 (1969). *But see California* v. *Byers*, 402 U.S. 424 (1971).

In the cases at hand, plaintiffs must identify themselves in the Title IV aid application process as nonregistrants under the Selective Service System's registration requirements. The law allows this information to be provided to the Director of the Selective Service System and directs that the Director work with the Secretary of Education to verify compliance statements. While the government has adopted a "passive enforcement" system under which identities of nonregistrants are not actively sought, it appears that the Service expects to implement soon an "active" enforcement program based on access to Social Security records.[7] *United States* v. *Eklund*, Cr. No.

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[7] *See* 50 U.S.C. App. § 462(e) (1981) allowing the President to require the Secretary of Health and Human Services to furnish various information to the Director, including names, addresses and social security numbers.

82-77, memorandum opinion at 4 (S.D. Iowa Nov. 29, 1982). It takes no great stretch of the imagination to discern how plaintiffs' identification of themselves as nonregistrants could incriminate them or provide a significant link in the chain of evidence tending to establish their guilt.

The court also believes that the information required by § 1113 is compelled. Defendants' argument that plaintiffs can "choose" not to apply for benefits, thereby avoiding a fifth amendment problem, has been consistently rejected by the Supreme Court. In *Marchetti* v. *United States*, 390 U.S. 39 (1968), the Court discussed *Lewis* v. *United States*, 348 U.S. 419 (1955), which had held that an occupational tax on wagering did not violate the fifth amendment because it merely imposed on the gambler the initial choice of whether he wished to gamble. The gambler need not register or pay the tax if he ceased to gamble. The Court in *Marchetti* found that reasoning no longer persuasive. "The question is not whether petitioner holds a 'right' to violate state [wagering] law, but whether, having done so, he may be compelled to give evidence against himself." *Marchetti*, 390 U.S. at 51.

As the Court in *Garrity* v. *New Jersey*, 385 U.S. 493, 498 (1967) noted "where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." The Court held in that case that threatened loss of employment for refusal to speak in an attorney general's investigation constituted compulsion. *Id.* at 497. In *Spevack* v. *Klein*, 385 U.S. 511, 514 (1967), the Court said that the fifth amendment grants to a person the right to remain silent until he chooses to speak in the unfettered exercise of his own will and to suffer no

penalty for such silence. A penalty, the Court said, is "the imposition of any sanction which makes assertion of the . . . privilege 'costly.' " *Id.* at 515. In that case, the threat of disbarment, the loss of professional standing, and loss of livelihood were held to be powerful forms of compulsion to make a lawyer relinquish the privilege. Loss of political office and of the right to contract with the government have also been held to constitute compulsion. *See Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973).

Contrary to defendants' implication in this case, economic consequences are relevant in assessing the presence of compulsion. In *Lefkowitz* v. *Cunningham*, 431 U.S. at 806-07, the Court observed that while earlier cases were concerned with penalties having a substantial economic impact, "the touchstone of the Fifth Amendment is compulsion, and *direct economic sanctions* and imprisonment are *not the only penalties* capable of forcing the self-incrimination . . .." (emphasis added.) The Court then interpreted the amendment's protection broadly by finding threatened loss of a powerful political office and diminished reputation inherently coercive. The Court buttressed those consequences with a finding of grave economic consequence.

The cases defendants rely on for the propositions that the privilege does not attach absent compulsion and that filing for financial aid is voluntary are distinguishable.[8] It is true that the Eighth Circuit in

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[8] *Andresen* v. *United States*, 427 U.S. 463 (1976) involved seizure of plaintiff's business records; plaintiff was never required to say anything, the records were seized by law enforcement personnel, and they were authenticated by prosecution witnesses, not the petitioner. The Court said the fifth amend-

United States v. *Warinner*, 607 F.2d 210 (1979), *cert. denied*, 445 U.S. 927 (1980) found that filing a W4E form was a voluntary act. The court noted that the taxpayer was not obliged to file the form but could have filed a different form, paid his tax and then filed for a refund. Loss of use of the money during that time was not sufficient to change the essentially voluntary nature of the act.

In contrast, plaintiffs here have no option of receiving federal financial assistance in another way. To receive the assistance they need to attend a college or university for the 1983-84 school year under any of the programs funded by Title IV, they must file a statement of compliance. Students who cannot complete their educations without such assistance have no more "choice" whether to file than did the gambler who could "choose" not to gamble. While such students concededly are not being summoned by grand juries or attorney generals' investigations, as were

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ment adheres to the person, not to information that may incriminate him. *Id.* at 473. At the time the records were made, petitioner was not subject to the cruel trilemma of self-accusation, perjury or contempt.

Fisher v. *United States*, 425 U.S. 391 (1976) is also inapposite. In that case, the Court said enforcing summonses against taxpayers' *lawyers* did not violate the fifth amendment because they did not compel the *taxpayers* to do anything. The Court said it had held repeatedly that the fifth amendment is limited to protecting compulsion exerted on the person asserting the privilege. *Id.* at 397.

Diebold v. *Civil Service Commission*, 611 F.2d 697 (8th Cir. 1979), relied on by defendants, is also easily distinguishable. In that case, plaintiff offered no proof that he would be penalized for invoking the fifth amendment or even that he would be required to testify. There was simply no evidence that he would be faced with the dilemma of surrendering his job or his privilege. *Id.* at 700.

persons in many of the Supreme Court cases finding compulsion, students who need financial assistance are forced to participate in an administrative process, perhaps even a hearing, where they are asked to assist the government in its investigation of their registration status. As the court discussed in part I, *supra*, denial of the opportunity to pursue one's education and chosen vocation is a severe penalty in this society. It is this court's opinion that denial of educational assistance is a sanction that makes assertion of the privilege costly, thereby compelling self-incrimination.

Defendants also rely on *Field* v. *Brown*, 610 F.2d 981 (D.C. Cir. 1979), where regulations requiring retired military officers to file a form saying they were not engaged in sales to the armed services were upheld against fifth amendment challenges. No criminal penalties would follow failure to file, but an investigation for conflict of interest would normally result when the form was not filed. That investigation could develop evidence of criminal conduct. While the form provided information that enabled authorities to reduce pension payments to retirees already holding federal employment, that function was characterized as a regulatory one. The court said that retired regular officers were a distinguished and honorable class, not a highly selective group inherently suspect of criminal activities. Retired officers had a bona fide, voluntary choice whether to complete the form or not.

The court finds that the cases at hand are distinguishable. Section 1113 does not apply even-handedly to all members of a distinguished group but instead is directed at a small group of likely violators. While not all nonregistrants are college students, among young male college students there are likely to be a

number of nonregistrants. Like the gambler in *Marchetti*, a nonregistrant college student who applies for aid must unmistakably identify himself as a nonregistrant. In addition, the court is not persuaded that *Field* was correctly decided. The withholding of retirement pay and referral of the matter to other federal agencies seem to be penalties on the exercise of the privilege. The fact that the government already had the authority to investigate does not make the information compelled less incriminating: "The judgment as to whether a disclosure would be 'incriminatory' has never been made dependent on an assessment of the information possessed by the Government at the time of the interrogation; the protection of the privilege would be seriously impaired if the right to invoke it was dependent on such an assessment . . .." *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 81 (1965).

In summary, the court finds that plaintiffs have demonstrated a probability of success on the merits of their claim that § 1113 violates the fifth amendment privilege against self-incrimination.

The court finds it unnecessary to decide whether the challenged statute violates the equal protection component of the fifth amendment's due process clause. The court also does not reach the merits of the Privacy Act and Presidential Proclamation claims.

IV. The Public Interest

The fourth *Dataphase* factor to consider in deciding whether to issue a preliminary injunction is the public interest. The court has already determined that plaintiffs have demonstrated a probability of success on the merits of their challenge to the law's constitutionality. Enforcement of a law likely to be found unconstitutional is not in the public interest.

The court finds that the public interest weighs in favor of the issuance of the preliminary injunction sought by plaintiffs.

Neither the court's ultimate conclusion that a preliminary injunction will issue nor anything set forth in this opinion should be construed as condoning noncompliance with the valid draft registration law of this nation, nor as affording solace to those who willfully violate that law by failing to register. On the contrary, this court is firmly of the opinion that those persons subject to the draft registration law owe their country a legal duty to comply with that law in all respects. The issue here before the court turns not on whether the registration law should be enforced, but in what manner. The Military Selective Service Act, 50 U.S.C. App. § 462 (1981), provides for a maximum penalty of five years in prison and/or a $10,000 fine for those convicted of violating its provisions. No doubt, as with the other criminal statutes of this nation, the Department of Justice and the United States attorneys will vigorously enforce the registration act and appropriate sentences will be imposed upon those who are convicted of willful violation of that law.

Accordingly,

IT IS ORDERED That plaintiffs' motions for a preliminary injunction are granted.

IT IS FURTHER ORDERED That an injunction issue, without security therefor, in the form attached hereto.

DATED: March 9, 1983.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-82 Civ. 1670

JOHN DOE, RICHARD DOE and PAUL POE, PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL H. BELL, Secretary, DEFENDANTS

3-83 Civ. 100

BRADLEY BOE, CARL COE and FRANK FOE, PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL H. BELL, Secretary, DEFENDANTS

MEMORANDUM ORDER

This matter comes before the court upon cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiffs' motions for a preliminary in-

junction enjoining defendants from enforcing Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982) were granted by memorandum order of this court on March 9, 1983. No appeal from that order was taken by defendants. Plaintiffs John Doe, Richard Roe and Paul Poe moved for summary judgment and for a permanent injunction on March 18, 1983. Although plaintiff Richard Roe no longer intends to apply for assistance for the 1983-84 term, plaintiffs John Doe and Paul Poe do intend to do so and, thus, two of the plaintiffs do have standing. Plaintiffs Bradley Boe, Carl Coe and Frank Foe filed an untimely motion for summary judgment on February 1, 1983 and a renewed motion for summary judgment on May 23, 1983. Defendants moved for summary judgment on April 18, 1983.

All parties agree that there exist no issues of material fact. *See* "Motion by Intervenor-Plaintiffs for Summary Judgment and Permanent Injunction" at 2; ["]Plaintiffs' Renewed Motion for Summary Judgment" at 1; and "Defendants' Motion for Summary Judgment" at 1. Thus, the cases are appropriate for summary disposition. *Scherr Construction Company* v. *Greater Huron Development Corporation*, 700 F.2d 463 (8th Cir. 1983). Based upon all files, records and proceedings herein, the memoranda of counsel, the findings and reasons contained in this court's memorandum order dated March 9, 1983 which is incorporated herein by reference and the reasons that follow, plaintiffs' motions will be granted and defendants' motion will be denied.

The outcome of these cases depends upon resolution of the constitutionality of Section 1113. The court in its March 9, 1983 memorandum order found

that plaintiffs had shown a probability of success on the merits of their claims that § 1113 constitutes a bill of attainder in violation of art. 1, § 9, cl. 3 of the United States Constitution and also violates the Fifth Amendment privilege against self-incrimination. The court did not reach the equal protection, Privacy Act and Presidential Proclamation claims. While defendants have referred the court to additional case authority on the issues, they rely on esesntially the same arguments presented in their opposition to issuance of a preliminary injunction. The court did not find those arguments to be persuasive then and does not find them to be so now. The court will address briefly the additional arguments advanced by the defendants.

Defendants contend that § 1113 is not an unconstitutional bill of attainder because the implementing regulations to § 1113 allow students who have not previously registered to become eligible for Title IV benefits by registering. *See* 48 Fed. Reg. 15580, 15583 (1983) (to be codified at 34 C.F.R. 668, 72 (b)). Section 1113, however, unequivocably provides that students who are required to register under § 3 of the Military Selective Service Act and who fail to do so "in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section" shall be ineligible for any Title IV assistance or benefits. The presidential proclamation to § 3 requires that persons born on or after January 1, 1963 present themselves for registration on their eighteenth birthday or on any day within the period of 60 days beginning 30 days before that date. *See* Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980). Notwithstanding the implementing regulations, students cannot register more than 30 days after their eighteenth birthday

without violating § 3 and § 1113 and facing possible criminal prosecution. To the extent that the regulations contradict the plain meaning of the statute, they are void. It is clear to this court that § 1113 determines guilt and inflicts punishment on an identifiable group based on the past act of nonregistration without the protections of a judicial trial. For the reasons discussed above and in this court's March 9, 1983 order, the court holds that § 1113 constitutes an unconstitutional bill of attainder.

Defendants further argue that *South Dakota* v. *Neville*, —— U.S. ——, 103 S. Ct. 916 (1983) requires the court to find that § 1113 does not violate the Fifth Amendment privilege against self-incrimination. *Neville*, however, depended in part on the fact that under *Schmerber* v. *California*, 384 U.S. 757 (1966), the state could legitimately compel a suspect, against his or her will, to take a blood-alcohol test. The Supreme Court in *Neville* reasoned that offering the suspect the option of refusing the test with attendant penalties for that choice was thus not coercive and not protected by the privilege against self-incrimination. *Neville*, 103 S. Ct. at 923. The Supreme Court specifically observed that this was not a case where the state had "subtly coerced respondent into choosing the option it had no right to compel." *Id.* In contrast, the government here does not contend that it could directly compel draft-age males to provide evidence of their registration status under § 3. The government clearly would have no right to do so. The government does contend, however, that it can indirectly compel draft-age male students to provide evidence of their registration status under § 1113 by withholding Title IV assistance. As the court explained in its March 9, 1983 order, the option

presented by § 1113 is one the government has no right to compel. The court also agrees with plaintiffs that *Neville* is distinguishable from the cases at hand. For the reasons discussed above and in this court's March 9, 1983 order, the court finds that § 1113 violates the Fifth Amendment privilege against self-incrimination.

Defendants finally maintain that any injunction granted should be limited to the federal district of Minnesota on the theory that an injunction beyond that geographic area would be of no benefit to these individual plaintiffs. As the Supreme Court stated in *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979), "the scope of injunctive relief as dictated by the extent of the violation established, not by the geographical extent of the plaintiff[s]." In these cases, the court has personal jurisdiction over defendants and the court's injunction therefore binds them throughout the United States. *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932); *State of New York* v. *Schweiker*, 83 Civ. 0726 (S.D.N.Y. March 7, 1983). *See also Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir. 1963), *cert. denied*, 376 U.S. 910 (1964); *National Welfare Rights Organization* v. *Weinberger*, 377 F. Supp. 861 (D.D.C. 1974). These cases involve challenges to the constitutionality of § 1113 on its face. The legislation is national in character and effect. It seems to this court that the public interest lies in favor of resolving promptly the issues raised by these cases. Furthermore, any injunction limited to the geographic area of Minnesota would allow defendants to enforce outside the district of Minnesota a statute that this court has found to be unconstitutional on two grounds. Such an anomalous result should be avoided.

Upon the foregoing,

IT IS ORDERED That plaintiffs' motions for summary judgment be and hereby are granted, and defendants' motion for summary judgment be and hereby is denied.

IT IS FURTHER ORDERED That an injunction issue as follows:

> IT IS ORDERED That defendants Selective Service System, Major-General Thomas K. Turnage, United States Department of Education and Terrel H. Bell, and their agents, servants, employees and representatives, and all persons acting by, through, for or in concert with them are permanently ENJOINED from in any way enforcing in any state § 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982).
>
> IT IS FURTHER ORDERED That defendants Selective Service System, Major-General Thomas K. Turnage, United States Department of Education and Terrel H. Bell, and their agents, servants, employees and representatives, and all persons acting by, through, for or in concert with them are permanently ENJOINED from in any way enforcing in any state the regulations promulgated under § 1113 at 48 Fed. Reg. 15578 (1980) (to be codified at 34 C.F.R. 668).

IT IS FURTHER ORDERED That, pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. § 2201, the Clerk of this Court forthwith enter judgment as follows:

> IT IS ORDERED, ADJUDGED AND DECREED That Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982) is unconstitutional

under the Constitution of the United States, art. I, § 9 and amend. V.

IT IS FURTHER ORDERED That defendants United States Department of Education and Terrel H. Bell, through their agents, servants, employees and representatives, send notice of entry of this order to student financial aid administrators at all colleges throughout the United States and instruct such administrators to post immediately in prominent locations copies of a notice to students of entry of this order to inform students that they need not supply information as to their Selective Service registration compliance in connection with their application for or as a requirement of their receipt of Title IV student financial aid. Such notice and instruction shall be sent on or before June 30, 1983.

IT IS FURTHER ORDERED That defendants United States Department of Education and Terrel H. Bell, through their agents, servants, employees and representatives, shall eliminate the Statement of Registration Compliance and any reference to a student's registration status on all aid forms, including the Student Aid Report, to be used and distributed after June 30, 1983.

IT IS FINALLY ORDERED That defendants include with all aid forms sent out after June 30, 1983 notice of entry of this order to inform students that they need not supply information as to their Selective Service registration.

DATED: June 16, 1983.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Docket No. 3-82-1670

ALSOP—J

JOHN DOE

v.

SELECTIVE SERVICE SYSTEM, U.S. DEPARTMENT OF EDUCATION, TERREL H. BELL, Sec., MAJOR-GENERAL THOMAS K. TURNAGE, Director

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's motions for summary judgment are granted and defts' motion for summary judgment is denied. Further, it is order, adjudged, and decreed that Section 1113 of Dept. of Defense Authorization Act of 1983 Pub. L. #97-252, 96 Stat. 748 (1982) is unconstitutional.

I certify this to be a true copy of the original record in my custody.

DATE: 6-16-83

ROBERT E. HESS
Clerk

BY: /s/ Gloria Griffin
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Docket Number 3-83-100

ALSOP—J

BRADLEY BOE

v.

SELECTIVE SERVICE SYSTEM, U.S. DEPARTMENT OF EDUCATION, TERREL H. BELL, Sec., MAJOR-GENERAL THOMAS K. TURNAGE, Dir.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's motions for summary judgment are granted and defts' motion for summary judgment is denied. Further, it is order, adjudged, and decreed that Section 1113 of Dept. of Defense Authorization Act of 1983 Pub. L. #97-252, 96 Stat. 748 (1982) is unconstitutional.

I certify this to be a true copy of the original record in my custody.

DATE: 6-16-83

ROBERT E. HESS
Clerk

BY: /s/ Gloria Griffin
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil Action File No. 3-82-1670

MINNESOTA PUBLIC INTEREST RESEARCH GROUP,
PLAINTIFF

and

JOHN RICHARD ROE, and PAUL POE,
INTERVENOR-PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL K. BELL, Secretary, DEFENDANTS

NOTICE OF APPEAL

The Selective Service System, Major-General Thomas K. Turnage, Director, and the Department of Education, Terrel H. Bell, Secretary, appeal under 28 U.S.C. 1252 to the United States Supreme Court from the Memorandum Order and Permanent Injunction entered in this action on June 16, 1983.

[Filed Jun. 27, 1983]

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

JAMES M. ROSENBAUM
United States Attorney

/s/ Neil H. Koslowe
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Telephone: (202) 633-3418

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil Action File No. 3-83-100

BRADLEY BOE, CARL COE, and FRANK FOE,
PLAINTIFFS

v.

SELECTIVE SERVICE SYSTEM, MAJOR-GENERAL THOMAS K. TURNAGE, Director, and UNITED STATES DEPARTMENT OF EDUCATION, TERREL H. BELL, Secretary, DEFENDANTS

NOTICE OF APPEAL

The Selective Service System, Major-General Thomas K. Turnage, Director, and the Department of Education, Terrel H. Bell, Secretary, appeal under 28 U.S.C. 1252 to the United States Supreme Court from the Memorandum Order and Permanent Injunction entered in this action on June 16, 1983.

[Filed Jun. 21, 1983]

Respectfully submitted,

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